

1992

# Bonnie Birch v. L.S. McCullough, Jr. : Reply Brief

Utah Court of Appeals

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BRIEF

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DOCKET NO. 920419 IN THE COURT OF APPEALS FOR THE STATE OF UTAH

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|                             |   |                       |
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| IN THE MATTER OF THE ESTATE | ) |                       |
| OF                          | ) |                       |
|                             | ) | COURT OF APPEALS CASE |
| GEORGE J. MCGONIGAL, JR.,   | ) | NO. 920419-CA         |
|                             | ) |                       |
| Deceased.                   | ) | DISTRICT COURT NO.    |
|                             | ) | 883901206 ES          |
| <hr/>                       |   |                       |
| BONNIE BIRCH,               | ) | Assignment from the   |
|                             | ) | Supreme Court         |
| Appellant,                  | ) |                       |
|                             | ) | Priority No. 16       |
| vs.                         | ) |                       |
|                             | ) |                       |
| L.S. McCULLOUGH, JR.,       | ) |                       |
|                             | ) |                       |
| Respondent and Cross        | ) |                       |
| Appellant                   | ) |                       |

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RESPONDENT'S REPLY BRIEF

\* \* \* \* \*

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT  
SALT LAKE COUNTY, STATE OF UTAH  
HONORABLE SCOTT DANIELS

\* \* \* \* \*

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**COURT OF APPEALS**

IN THE COURT OF APPEALS FOR THE STATE OF UTAH

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## ARGUMENT

### I. THE BURDEN OF PROOF IN AN UNDUE INFLUENCE WILL CONTEST IS A PREPONDERANCE OF THE EVIDENCE.

#### A. Buttar's Estate Stands for the Proposition that the Burden of Persuasion in an Undue Influence Will Contest is a Preponderance of the Evidence.

Ms. Birch asserts "that a careful reading of [In Re Buttars' Estate] discloses that the Court is there talking about the burden of going forward and is not addressing the ultimate issue of "Burden of persuasion". Appellant's Reply Brief at 9-10. This is plainly wrong. The burden of going forward has nothing to do with concepts like clear and convincing evidence and preponderance of the evidence; those terms can only apply to the ultimate burden of persuasion. Thus, where the Supreme Court in Buttars' Estate states that the contestant must prove "by a preponderance of evidence" that the testatrix "was acting under . . . undue influence," the Court is addressing the same issue Mr. McCullough is raising on this cross appeal: What is the burden of persuasion when a will contestant alleges undue influence? The Supreme Court stated that the burden is a preponderance of the evidence. In Re Buttars' Estate, 261 P.2d 171, 172 (Utah 1953). Thus, Mr. McCullough asks the Court of Appeals to reverse Judge Daniels' ruling on this point.

B. Courts, including the Utah Supreme Court, Use the Word "Substantial" when referring to Cases involving Clear and Convincing Evidence and Preponderance of the Evidence.

Four Utah Supreme Court decisions state that there must be "substantial" proof of undue influence in order to sustain a verdict denying probate to a will on that basis. In Re Lavelle's Estate, 248 P.2d 372, 375 (Utah 1952); see also In Re Bryan's Estate, 25 P.2d 602, 608 (Utah 1933); In Re Goldsberry's Estate, 81 P.2d 1106, 1112 (Utah 1938); In Re George's Estate, 112 P.2d 498, 499-500 (Utah 1941). Throughout her Reply Brief, Ms. Birch argues directly and implicitly that the Supreme Court's use of the word "substantial" is equivalent to requiring clear and convincing evidence. Ms. Birch's own authorities dispute this.

For instance, Ms. Birch cites C.J.S. for the following proposition:

According to some authorities, a preponderance of the evidence is necessary and sufficient to establish undue influence in the execution of a will. However, in numerous cases, it has been said that undue influence, invalidating a will, must be established by clear, satisfactory, and convincing evidence, by compelling evidence, or by the manifest weight of the evidence. In any event, undue influence in the execution of a will must be shown by substantial evidence and evidence which merely raises a suspicion or conjecture that

the will was the product of undue influence  
is insufficient.

Appellant's Reply Brief at 14. 94 C.J.S. Wills §251 (1956)  
(emphasis added; citations omitted). What this citation  
shows is that "substantial" evidence is required regardless  
of whether the burden of proof is clear and convincing  
evidence or by a preponderance of the evidence.

Likewise, Ms. Birch cites the New Mexico Supreme Court  
case of Lumpkins v. McPhee for the proposition that evidence  
is not substantial unless it is "clear, strong and  
convincing." Appellant's Reply Brief at 11; Lumpkins v.  
McPhee, 286 P.2d 299, 306 (N.M. 1955). However, the  
paragraph proceeding Ms. Birch's citation refutes her  
argument.

Ordinarily, the evidence is deemed  
substantial if it tips the scales in favor of  
the party on whom rests the burden of proof,  
even though it barely tips them. He is then  
said to have established his case by a  
preponderance of the evidence. A finding in  
his favor on the decisive issue is thus said  
to be supported by substantial evidence.

Lumpkins, 286 P.2d at 306. What this case shows is that the  
concept of substantial evidence is equally important in  
cases where the burden is a preponderance of the evidence as  
it is in cases where the burden is clear and convincing  
evidence. Utah likewise recognizes that substantial



evidence can be required in cases requiring a preponderance of the evidence. Rowe v. Rowe, 365 P.2d 797, 797 (Utah 1961) ("In line with our oft-expressed determination that on appeal the conclusions of the trial court in a case like this will remain inviolate if supported by a preponderance of competent, substantial and believable evidence . . ."); Piute Reservoir & Irr. Co. v. West Panguitch I.& R. Co., 364 P.2d 113, 116 (Utah 1961) ("[The applicant] must support a decision in its favor on this question by substantial evidence, and it has the burden of convincing the trier of the facts by a preponderance of all of the evidence . . ."). Thus, the Court should reject Ms. Birch's efforts to equate "substantial" proof with clear and convincing evidence.

C. Deed Cases Show that the Burden in Undue Influence Will Cases should be a Preponderance of the Evidence.

Mr. McCullough agrees with Ms. Birch that an action challenging the validity of a deed on the grounds of undue influence must be proven on the basis of clear and convincing evidence. Appellant's Reply Brief at 12. From this, Ms. Birch argues that the same result should apply in will contests. However, this does not follow.

Any attack on a deed, including an attack based on the alleged incompetency of the grantor, requires a showing of clear and convincing evidence. Richmond v. Ballard, 325 P.2d 839, 849 (Utah 1958). A will contestant's burden of proof on allegations that the testator was incompetent is a preponderance of the evidence. Matter of Estate of Kesler, 702 P.2d 86, 88 (Utah 1985). Thus, deed contests and will contests cannot be construed in pari materia.

Moreover, while a deed is generally effective upon delivery, a will is generally not effective until admitted to probate. Compare Kresser v. Peterson, 675 P.2d 1193, 1994 (Utah 1984) with U.C.A. §75-3-101 et seq. (1978). Thus, to protect innocent third parties, deeds need a strong presumption of validity. On the other hand, since a will is not admissible to probate until after its validity is determined, there is no similar need for a strong presumption of validity.

In addition, many times the grantor of the deed is available to testify; the testator, by contrast, is never available. As a result, in undue influence will contests, the contestant will be left with circumstantial evidence. As the Utah Supreme Court has observed:

In a case of this sort, it is not usually possible to procure direct evidence of

statements and conduct which one accused of undue influence has used on the decedent. One of the two is dead; the other cannot be expected to give evidence against himself. The usual way is to give the surrounding circumstances from which deductions may be made.

In Re Hanson's Estate, 52 P.2d 1103, 1110 (Utah 1935). To leave the contestant to circumstantial evidence and require proof by clear and convincing evidence puts an enormous and unfair burden on contestants and makes Utah's aging population vulnerable to the unscrupulous. Accordingly, while any attack on a deed requires clear and convincing evidence, claims of undue influence in will contests should be based on a preponderance of the evidence.

D. The Burden of Proof does not Vary Depending on the Facts of the Case.

Ms. Birch twice suggests that the burden of persuasion in undue influence will contests varies depending on the facts of the case. Appellant's Reply Brief at 12-13 ("the appropriate rule of law was applied in requiring that the proof of persuasion be that of clear and convincing evidence, taking into account the 'facts and circumstances' of the case at hand"), at 15 ("we respectfully submit that the trial judge made the correct pronouncement of law under the facts and circumstances involved"). This is false. The

burden of proof will be the same for all litigants who allege undue influence in a will contest. The determination of whether a particular litigant has met that burden will vary from case to case depending on the evidence adduced. That is the only aspect that varies; the law remains constant.

#### CONCLUSION

Accordingly, if the Court of Appeals does not affirm Judge Daniels' decision on the basis of his ruling on the competency issue, Mr. McCullough requests that the Court affirm the result by reversing Judge Daniels' decision on the standard of proof required when a will contestant alleges undue influence.

Dated September 11, 1992.

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**CERTIFICATE OF HAND DELIVERY**

I hereby certify that four true and correct copies of the foregoing RESPONDENT'S REPLY BRIEF was hand-delivered, on this 15 day of September, 1992 to the following:

Brant H. Wall  
Wall & Wall  
Suite 800 Boston Building  
Salt Lake City, Utah 84111

A handwritten signature in cursive script, reading "Charles M. Bennett", is written over a horizontal line.